

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

75-7308

75-7308

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

L. BATLIN & SON, INC.,

Plaintiff-Appellee,

vs.

JEFFREY SNYDER, d/b/a J.S.N.Y. and
ETNA PRODUCTS CO., INC.,

Defendants-Appellants.

BRIEF OF E. MISHAN & SONS, INC.
AS AMICUS CURIAE

JAMES E. SIEGEL
MYRON GREENSPAN
LACKENBACH, LILLING & SIEGEL
Attorneys for E. Mishan & Sons, Inc.
41 East 42nd Street
New York, New York 10017
(212) 986-7630

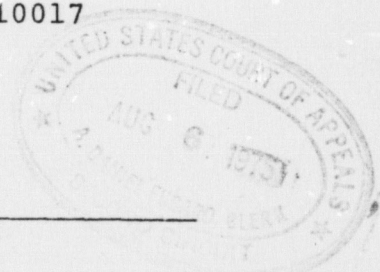


TABLE OF CONTENTS

	<u>Page No.</u>
Table of Cases, Statutes and Publications.....	ii
I. Introduction.....	1
II. The Law in this Circuit Concerning Appeals from Interlocutory Orders Granting or Denying Preliminary Injunctions.....	4
A. A Preliminary Injunction Rests in the Sound Discretion of the Trial Court.....	4
B. The Appellate Court Should Preserve the Status Quo.....	7
III. The Circumstances Surrounding this Case on Appeal and the Related Case in which Mishan is a Party...	11
A. Defendants-Appellants Seek to Accomplish by Procedural Means the Enforcement of an Illegal Monopoly, a Result which Defendants-Appellants have been unable to Accomplish in the Lower Court	11
B. To Reverse the Order and Preliminary Injunction Entered by the Lower Court on May 15, 1975 Will Give Rise to Numerous Inconsistencies and Will Upset the Status Quo.....	13
C. A Reversal of the Order and Preliminary Injunction Entered by the Lower Court on May 15, 1975 Will Encourage Defendants-Appellants to Continue a Course of Illegal Conduct that is Already Steeped in History.....	16
D. The Lower Court was Correct: It did no More than Exercise Proper Discretion in Granting Plaintiff-Appellee's Motion for a Preliminary Injunction and Preserving the Status Quo.....	19
1. The <u>Status Quo</u>	19
2. The Irreparable Harm and Injury to the Plaintiff-Appellee will far Outweigh that to the Defendants-Appellants if this Court Reverses the Lower Court's Order and Preliminary Injunction of May 15, 1975.....	20

3. This Court Should not Reverse the Lower Court's Order and Preliminary Injunction of May 15, 1975. In Not One but in Two Cases Involving the Same Subject Matter the Lower Court Held Defendants-Appellants Have Little Probability of Success at a Full Trial on the Merits.....	23
4. The Equities are Balanced in Favor of this Court's Affirming the Lower Court's Decision.....	25
V. This Court's Reversal of the Lower Court's Order and Preliminary Injunction Dated May 15, 1975 Will Be Used by the Defendants-Appellants as a Holding Tantamount to this Court Finding the Copyright Valid.....	26
Conclusion.....	28

TABLE OF CASES, STATUTES AND PUBLICATIONS

CASES

	<u>Page No.</u>
Ames v. Associated Musicians of Greater New York, Local 802, AFM, 359 F.2d 777 (2 Cir. 1966).....	4
Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2 Cir. 1969).....	29
Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315 (2 Cir. 1969).....	6
Goldwyn Pictures Corp. v. Howells Sales Co., Inc., 287 F.100 (2 Cir. 1923), cert. den. 43 S.Ct. 703, 262 U.S. 755, 67 L.Ed. 1217.....	7
Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2 Cir. 1966).....	5,6,7,11
Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2 Cir. 1962).....	20
Joshua Meier Company v. Albany Novelty Mfg. Co., 236 F.2d 144 (2 Cir. 1956).....	4, 5
Meccano, Ltd. v. John Wanamaker, New York, 405 S.Ct. 463, 253 U.S. 136, 64 L.Ed. 822 (1920).....	4,5,6
National Picture Theatres, Inc. v. Foundation Film Corp., 266 F. 208 (2 Cir. 1920).....	6
Omega Importing Corp. v. Petri-Kine Camera Co., Inc., 451 F.2d 1190 (2 Cir. 1971).....	8
Safeway Stores, Inc. v. Safeway Properties, Inc., 307 F.2d 495 (2 Cir. 1962).....	5
Sonesta International Hotels Corp. v. Wellington Assoc., 483 F.2d 247 (2 Cir. 1973).....	29
Unicon Management Corp. v. Koppers Company, 366 F.2d 199 (2 Cir. 1966).....	9,10

STATUTES

17 U.S.C. 101.....	20, 21
17 U.S.C. 116.....	21
Moore's Federal Practice.....	8

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
L. BATLIN & SON, INC.,
Plaintiff-Appellee,
vs.
JEFFREY SNYDER, d/b/a J.S.N.Y.
and ETNA PRODUCTS CO., INC.,
Defendants-Appellants.
-----X

:
:
:
Appeal No. 75-7308
:
:

BRIEF OF E. MISHAN & SONS, INC.
AS AMICUS CURIAE

I. INTRODUCTION

This brief is submitted by E. MISHAN & SONS, INC.
(hereinafter MISHAN) as amicus curiae.

MISHAN is the defendant in another matter pending before the District Court for the Southern District of New York. Indeed, this other matter is pending before the same judge, to wit, the Honorable Judge Charles M. Metzner. The full title of the MISHAN matter is ETNA PRODUCTS CO., INC. and JEFFREY SNYDER, doing business under the name and style J.S.N.Y. v. E. MISHAN & SONS, Civil Action No. 75 Civ. 428 (hereinafter 75 Civ. 428). The defendants-appellants in this matter are identical to the plaintiffs in 75 Civ. 428 and, in both matters, there is involved the defendants-appellants' claim to copyright, to wit, Copyright Registration No. Gp 95881, recorded in the Copyright Office.

There was a flurry of motions in 75 Civ. 428, but salient to the issues before this Court in this appeal is the motion for preliminary injunction by these same defendants-appellants on the ground, inter alia, of copyright infringement. The motion was denied in an opinion rendered by the District Court on February 13, 1975. This opinion appears at pages A122-A129* in the joint appendix submitted by the parties in this appeal. Notable is the lower court's statement, in denying defendants-appellants' motion for a preliminary injunction:

"I think that there is serious doubt as to whether plaintiffs (defendants-appellants here) can prevail on their infringement claim (A-125)."

MISHAN, then, is under no prohibition to manufacture, use, offer for sale, sell or distribute an "Uncle Sam" bank. The plaintiffs there (the defendants-appellants here) did not appeal the lower court's denial of their motion for a preliminary injunction, obviously because they appreciated that the lower court did not abuse its discretion in denying that motion.

In this matter, it was not the defendants-appellants who sought a preliminary injunction but, rather, the plaintiff-appellee. The main reasons appear to be to insure a preservation of the status quo, to insure that the plaintiff-appellee in this case would stand in the same shoes as does MISHAN in 75 Civ. 428, and

*References here to the joint appendix will be prefaced by the letter "A" followed by the page number thereof. All emphases are MISHAN's unless otherwise noted.

to insure that the defendants-appellants would not attempt to accomplish by subterfuge (the enforcement of their invalid copyright by the U. S. Customs Service) what they could not accomplish in the lower court.

Expressed in other words, defendants-appellants are attempting to accomplish in this appeal what the court below has already twice said they are unlikely to achieve, namely, a holding that the claim to copyright of Copyright Registration No. Gp 95881 is valid and enforceable.

Defendants-appellants, then, have raised before this Court issues not properly before it. They are attempting to use this Court for purposes for which it was not intended, more particularly, to bypass the orderly course of judicial administration in the lower courts, and to place before this Court an issue or issues before the parties have had their day in court below on the merits of these issues.

The plaintiff-appellee correctly states the issue before this Court in this appeal. MISHAN believes a stronger voice should be asserted against defendants-appellants imposing upon this Court issues which MISHAN believes are not properly before it, and that the issues which are properly before this Court should be fully and adequately briefed.

II. THE LAW IN THIS CIRCUIT CONCERNING APPEALS FROM
INTERLOCUTORY ORDERS GRANTING OR DENYING PRELIMINARY
INJUNCTIONS

A. A PRELIMINARY INJUNCTION RESTS IN THE SOUND
DISCRETION OF THE TRIAL COURT

The correct general doctrine is, and the cases are legion, that whether a preliminary injunction shall be awarded rests in the sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed, unless contrary to some rule of equity or the result of improvident exercises of judicial discretion. Meccano Ltd., v. John Wannamaker, New York, 49 S.Ct., 463, 465, 253 U.S. 136, 140, 64 L.Ed. 822 (1970).

This Court recognizes the general doctrine, namely, that a preliminary injunction is directed to the discretion of the lower court. It has, therefore, been noted that the scope of review over interlocutory orders granting or denying a preliminary injunction is very limited, Marty Ames et al. v. Associated Musicians of Greater New York, Local 802, AFM, et al., 359 F.2d 777, 778 (2 Cir. 1966). Undoubtedly, this is because, as the general doctrine notes, a motion for such relief is directed to the sound discretion of the district judge whose decision will not be reversed unless an abuse of discretion is apparent, Joshua Meier Company v. Albany Novelty Mfg. Co., 236 F.2d 144, 146 (2 Cir. 1956).

The granting of a preliminary injunction pending a final hearing, therefore, is within the sound discretion of the trial court, and such an order will be reversed on appeal only upon a showing of abuse of that discretion or a violation of some rule

of equity, Safeway Stores, Inc. v. Safeway Properties, Inc., 307 F.2d 495,500 (2 Cir. 1962). Since the appellate courts' scope of review is limited, Joshua Meier Company v. Albany Novelty Mfg. Co., supra, the next question is to what extent an appellate court may go beyond review of the grant or denial of a preliminary injunction.

An appellate court may, for example, go beyond review of the denial of a preliminary injunction and direct entry of a judgment for a plaintiff on the merits, Leo Hurwitz et al. v. Directors Guild of America, Incorporated, 364 F.2d 67, 70 (2 Cir. 1966). As the court stated:

As a general rule, when an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal (ibid.).

However, this rule is subject to a general exception and, as the court in Hurwitz, supra, observed:

The appellate court may dismiss the complaint on the merits if its examination of the record upon an interlocutory appeal reveals that the case is entirely void of merit.

Such an exception serves the obvious interest of economy of litigation, and this interest is equally served if the appellate court directs a verdict for plaintiff in an appropriate case. We have found no case reaching this result, but this is not surprising since it is the rare case that contains no triable issue of fact, and it is rarer still that this would result in a judgment for the plaintiff at the pre-trial stage (ibid.), citing Meccano, supra.

The court in Hurwitz went on to say:

We expressly refused to pass upon this question (in Meccano) because the plaintiff did not warrant final relief. Finding no reason why the cautious exercise of such a power would be undesirable we conclude that we may direct the entry of a judgment for the plaintiff here (ibid.).

In Meccano, supra, then, the plaintiff did not warrant final relief and thus an appellate court would not have been warranted going beyond review of a denial of a preliminary injunction to direct entry of a judgment for plaintiffs on the merits. In Hurwitz, supra, however, the cautious exercise of such a power warranted this extra-discretionary review, and it was found the entry of a judgment was appropriate. The granting of the preliminary injunction in the lower court in this case is based upon a state of controverted facts. See Concord Fabrics, Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315, 1317 (2 Cir. 1969), where the appellate court said it will go beyond the lower court's discretion and grant a preliminary injunction where no part of the decision below turned on credibility. In this case, neither party has alleged that the facts below are admitted or uncontroverted and, therefore, credibility here is an issue. There is nothing in the record in this case, therefore, that would suggest this Court go beyond review of the lower court's granting to the plaintiff-appellee a preliminary injunction. There is nothing here, then, that would justify this Court's cautious exercise of the power it has, and directing entry of a judgment for either of the parties. Thus, this is not a case that would justify interference with discretion of the lower court, National Picture Theatres, Inc. v. Foundation Film Corporation, 266 F. 208 (2 Cir. 1920). Indeed, all that this Court has before it, inter alia, is the complaint

of the plaintiff-appellee and the transcript of the proceedings of May 6, 1975. The answer of the defendants-appellants, if there is one, is not a part of the record before this Court. The transcript of the proceedings of May 6, 1975 (A-48 - A-113) clearly shows that many facts testified to by the so-called expert witnesses of each of the parties are in controversy.

This Court, then, cannot consider or render a determination on the merits of this case, if for no other reason than the fact that the whole or the entire case as it is has not been brought before this Court, Goldwyn Pictures Corporation et al. v. Howells Sales Co., Inc. et al., 287 F.100, 102 (2 Cir. 1923), cert. den. 43 S.Ct. 703, 262 U.S. 755, 67 L.Ed. 1217. All the more is this true since this Court does not have any of the record of the MISHAN case before it, 75 Civ. 428, a case involving the same defendants-appellants (they are the plaintiffs there) and a case involving the same subject matter. Indeed, there are issues before the lower court in 75 Civ. 428 which are not before this court in this appeal, but which are before the lower court in this case and are critical to a determination of the merits of this case.

B. THE APPELLATE COURT SHOULD PRESERVE THE STATUS QUO

Notable is the decision of this Court in Hurwitz, supra. In Hurwitz, an appeal was taken from an order denying a preliminary injunction. This Court, persuaded by its study of the record that

the plaintiffs were entitled to judgment on the admitted facts as a matter of law, reversed with instructions to grant a permanent injunction. To be sure, the circumstances were unusual, but the decision stands for the proposition that once a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done, 9 Moore's Federal Practice, ¶110.25(1), at page 273. In large measure, it is believed this Court has recognized the frequent statements that the discretion of a district judge in refusing or granting a temporary injunction will generally be respected, Omega Importing Corp. v. Petri-Kine Camera Co., Inc., 451 F.2d. 1190, 1197 (2 Cir. 1971). Against this, then, are the principles that the general purpose of the preliminary injunction is to preserve the status quo pending final determination of the action, and that the showing required is less strong than when the injunction would require costly changes in existing operations (ibid.).

An appellate court must indeed accept a district court's assessment of credibility and give proper regard to its finding of facts and even to its feel of the case, Omega Importing Corp., supra. But Congress would scarcely have made orders granting or refusing temporary injunctions an exception to the general requirement of finality as a condition to appealability if it intended appellate courts to be mere rubber-stamps save for the rare cases when a district judge has misunderstood the law or transcended the bounds of reason (ibid.).

This Court is not a mere rubber-stamp, but insures that the primary function of a preliminary injunction is performed, namely, that of maintaining or preserving the status quo. A preliminary injunction is solely an interim relief, and the court below could not have pretended to decide the merits of this case. It had to preserve the status quo of all of the parties in this action and all of the parties in the MISHAN action, 75 Civ. 428, if for no other reason than the fact that in both actions the defendants-appellants are the same, and the subject matter is the same. This, the lower court did, adhering to hornbook law that the general purpose of a preliminary injunction is to preserve the status quo pending final determination of the action, Unicom Management Corp. v. Koppers Co., Inc. et al., 366 F.2d 199, 204 (2 Cir. 1966). There, the court stated:

It follows that the court must have discretion to fashion such a preliminary injunction as may best approximate past positions in the light of the basic rights of the parties.

Other courts have granted preliminary relief without regard to establishing the status quo, as long as there was a showing of potential irreparable harm, e.g., Ross-Whitney Corp. v. Smith, Kline & French Lab., 207 F.2d 190, 199 (9 Cir. 1953), and at other times, as long as the injunction creates a common sense modus vivendi to keep peace between the contracting parties, and avoids unnecessary economic waste until the case is adjudicated, e.g. Welton v. City of Lockport, 13 Misc.2d 341, 177 N.Y.S.2d 438 (Sup. Ct. 1958). Here, we need only find that the injunction serves "to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2 Cir. 1953).

The court in Unicon, supra, also held that the party seeking a preliminary injunction has the burden of convincing the court with reasonable certainty that it must succeed in the final hearing, especially where it appears that a lack of adequate showing of irreparable damage existed. But the court in Unicon, supra, also said that the more generally accepted rule is:

It will ordinarily be enough that the plaintiff (defendant here) has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation (id. at pp. 204, 205),

and that:

Where, as here, "the balance of hardships" tips decidedly towards the party requesting the temporary relief (citing case), the likelihood of success is "merely one strong factor to be weighed along with the comparative injuries of the parties". (id. at p. 205).

The purpose of the preliminary injunction in this case is to maintain the status quo, and to maintain the status quo of anyone concerned with the "Uncle Sam" bank. This includes not only the parties here, but the parties in the MISHAN action, 75 Civ. 428. The scope of this Court's review is limited. It should be directed primarily to whether or not the court below abused its discretion and this Court should, therefore, look into the merits of this case only to the extent necessary to decide that issue (whether or not the court below abused its discretion) in order to decide this appeal. These are the general rules. There are exceptions. One exception is where an appellate court can dismiss the complaint on the merits

if, upon an examination of the record, the case is entirely void of merit. That exception is particularly applicable where it serves the obvious interest of economy of litigation, Hurwitz, supra. The other exception, of course, is to insure the status quo is preserved, because the primary function of a preliminary injunction is to insure that very result. The question of likelihood of success is but one factor to be considered in insuring that the status quo is preserved. To preserve it in such a manner that inconsistencies shall not be allowed to prevail, and that the relative hardships of the parties shall be minimized, are the primary considerations.

III. THE CIRCUMSTANCES SURROUNDING THIS CASE ON APPEAL AND THE RELATED CASE IN WHICH MISHAN IS A PARTY

A. DEFENDANTS-APPELLANTS SEEK TO ACCOMPLISH BY PROCEDURAL MEANS THE ENFORCEMENT OF AN ILLEGAL MONOPOLY, A RESULT WHICH DEFENDANTS-APPELLANTS HAVE BEEN UNABLE TO ACCOMPLISH IN THE LOWER COURT

What is at stake in this appeal does not only concern the parties directly involved in this suit. Rather, it is a concern of all of the parties in these companion matters, and numerous other importers as well, entering into what is perhaps the most critical season of the year. There was the Housewares Show on July 11, the Gift Show on July 27, and there is forthcoming the Gibson Show on August 4, and the Gift Show on August 10. Moreover, as this Court knows, we are facing the Fall season, and shortly thereafter, numerous holidays which occur before the end of the year, not the least of which are Thanksgiving and Christmas.

The question, then, is whether defendants-appellants will be permitted to enforce an otherwise illegal monopoly to the irreparable harm and injury of not only all of the importers in this trade and industry, but the consuming public as well. In two instances before the lower court, the same decision was reached. But the decision thus far reached was only preliminary to a full hearing on the merits. Expressed otherwise, none of the parties to the two companion matters has had its day in court, and, therefore, has had the opportunity to fully develop for the court all of the facts and circumstances pertaining to the pending issues. Not the least of these issues are the questions of originality, creativity, proper copyright notice, and fraud on the Copyright Office, the United States Customs Service, and the public in that defendants-appellants have a history of copying items that are in the public domain and recording their own Claim to Copyright with respect thereto.

All of these issues are pending before the lower court in the companion MISHAN matter, 75 Civ. 428. With respect to the pure issue of validity of copyright, MISHAN has made and renewed a Motion for Summary Judgement on the ground there are no genuine issues of fact to be tried in the companion case, but has been prevented from obtaining a determination by the actions of defendants-appellants in this appeal. Thus, the lower court in the companion MISHAN matter, 75 Civ. 428, is holding MISHAN's Motion for Summary Judgement

in abeyance pending the outcome of this appeal. Notwithstanding this court having agreed to expedite this appeal, it is likely that a decision will not be reached until the end of August or perhaps sometime in September. Thus, while importers, if they have samples, will have been and shall be able to display them at the various shows occurring in July and August, and will even be in a position to take orders based upon showing these samples, they will not be able to fill these orders until this Court reaches a decision. If this Court reverses the lower court, defendants-appellants will be in a position to enforce their illegal copyright through the offices of the United States Customs Service until a determination is made on the merits in these cases.

It is clear, then, they are seeking to achieve a result by means of procedure that they are not entitled to by law. Indeed, if this Court reverses the Order and Preliminary Injunction entered by the lower court on May 15, 1975, the defendants-appellants will have succeeded. Surely, this is not the intention of this Court, especially where, as here, maintaining the status quo is such an important part of the matter before this Court, and, because copyright is a monopoly, free competition and the public interest play an equal, if not more important, role.

B. TO REVERSE THE ORDER AND PRELIMINARY INJUNCTION
ENTERED BY THE LOWER COURT ON MAY 15, 1975 WILL GIVE
RISE TO NUMEROUS INCONSISTENCIES AND WILL UPSET THE
STATUS QUO

If this Court reverses the lower court, then the only one that will be able to import and sell the "Uncle Sam" bank during the pendency of the trial on the merits will be defendants-appellants.

On the other hand, everyone else in the same business will be able to sell the identical "Uncle Sam" bank simply by having it manufactured domestically. Moreover, everyone, including MISHAN, plaintiff-appellee and defendants-appellants, will be able to import and sell from Taiwan (as opposed to Hong Kong) a metal (as opposed to a plastic) "Uncle Sam" bank that importers in this industry have been importing from Taiwan and selling within the United States for the past approximately three, four, or five years.

Can this Court possibly imagine the confusion at Customs? The Copyright Registration in question, Gp 95881, says absolutely nothing respecting any limitation of any kind. The title, purely and simply, is "Uncle Sam Bank" and the nature of work is ego-tistically defined as a "sculpture". No mention is made of the height of the bank, no mention is made of the material from which the bank is fabricated, and, equally more important if not more so, is the fact that no mention is made of what preceded Mr. SNYDER's so-called work (MISHAN will not deign to add such words as "of art" or "reproduction of a work of art").

Customs, then, having for the past few years allowed a metal "Uncle Sam" bank to enter into the United States, so that the "Uncle Sam" bank could then enter into the channels of free competition and reach the consuming public without anyone attempting to enforce an illegal monopoly, is now faced with having to levy a blanket freeze on all "Uncle Sam" banks coming into this country

or, in the alternative, going through the trouble of attempting to distinguish between metal and plastic banks. Neither alternative makes any sense. This Court certainly did not and does not intend for such a state of affairs to subsist and, surely, upon becoming cognizant that such circumstances might result, will surely affirm the lower court's granting of the preliminary injunction.

The lower court in the two companion matters was, simply stated, being consistent and preserving the status quo. In the companion MISHAN case, 75 Civ. 428, the lower court observed that "the bank was originally designed in the middle of the 19th century" (A-122), "was fashioned of cast iron" (A-122, 123), and when given a cursory observation, appeared to be the same as the SNIDER bank, save in size and material (ibid). For these reasons, inter alia, the lower court in the companion MISHAN case held:

"I think that there is serious doubt as to whether plaintiffs can prevail on their infringement claim (A-125)."

The lower court, then, denied defendants-appellants' Motion for Preliminary Injunction. It, quite properly, and well within its discretion, did exactly the same thing (A-116) here. The difference between the two cases in the lower court is that, in this case, the plaintiff-appellee requested the court for a Preliminary Injunction against defendants-appellants enforcing their illegal monopoly, based upon an invalid copyright, through the offices of the United States Customs Service. A reversal of

the Preliminary Injunction will in effect reverse the lower court in the companion MISHAN case, 75 Civ. 428. With one fell swoop, then, defendants-appellants will have accomplished through rules of procedure applicable to the Federal Court system what, up to the present time, they have been unable to accomplish by law.

Last, but not least, a reversal of the Order and Preliminary Injunction entered by the lower court will result in a discrimination against commerce between a foreign country and the United States. As pointed out above, the stay of the lower court's Order and Preliminary Injunction simply prevents one from importing the plastic nine-inch "Uncle Sam Bank" from overseas. It does not prevent one from domestically manufacturing the item. There is no question but that certain laws and statutes of the United States have the effect of discriminating against commerce between a foreign country and this country. With respect to the Copyright Laws, however, a prerequisite to such discrimination, if indeed, such discrimination exists, is a valid, legal, binding and fully enforceable copyright. This, the defendants-appellants do not have.

C. A REVERSAL OF THE ORDER AND PRELIMINARY INJUNCTION
ENTERED BY THE LOWER COURT ON MAY 15, 1975 WILL
ENCOURAGE DEFENDANTS-APPELLANTS TO CONTINUE A COURSE
OF ILLEGAL CONDUCT THAT IS ALREADY STEEPED IN HISTORY

This Court is strongly urged to take into consideration the fact that the parties have not had their day in court. There are so many issues to be developed and tried, not the least of

which is the defendants-appellants' conduct of copying items that are in the public domain, publishing them in the United States with their own copyright notice, and then recording their own claim to copyright with the Copyright Office. The "Uncle Sam" bank is a perfect example. It was first patented in 1886. It then became one of a number of collector's items, all of which are frequently referred to as "antique banks". Numerous copies of the "antique" "Uncle Sam" bank have appeared over the years. For the past three, four or five years, a number of these copies have been imported into this country from Taiwan. Indeed, the defendant-appellant SNYDER admitted that his "Uncle Sam" bank is a copy of one that he saw in July of 1974.

There is also an "antique bank" known as an "Elephant Bank". Notwithstanding the antiquity of this bank, notwithstanding the fact it is in the public domain, notwithstanding it can be imported from Taiwan in metal, the defendants-appellants reproduced the "Elephant" "antique" bank, appear to have published it in the United States, and have placed on such plastic reproduction their own copyright notice. In this particular instance, the size of the two banks, namely, the metal bank and the plastic bank, are identical. It will immediately be apparent that, in the case of the "Elephant Bank", the size of the metal one was small enough so that, when reproduced in plastic, the cost, packaging and shipping parameters are all correct. Accordingly, the size of the bank did not require any variation. There are other examples.

In addition to these other examples, however, this Court should take cognizance of the fact that, at the evidentiary hearing before the lower court, defendants-appellants' own expert witness testified that the defendants-appellants copied their nine-inch plastic "Uncle Sam" bank from an eleven-inch metal "Uncle Sam" bank, most likely the one that SNYDER said in his affidavit, he saw in July of 1974. The only thing required is a three-dimensional pantograph (A-91,92). Thereafter, all that is required is for a mechanic to introduce into the scaled-down model the features of the eleven-inch metal "Uncle Sam" bank simply by copying them (A-92-94). If one insists, the mechanic can be called an "artist" or a "sculptor" (A-94). Whatever he is called, all he did, here, was to "copy" (ibid.).

The differences, if any, were dictated by purely functional considerations, such as packaging, shipping or transportation, and the economics of reproducing a plastic copy. As an example, in SNYDER's nine-inch plastic "Uncle Sam" bank, one arm and the umbrella are molded integrally with the body. This is, purely and simply, a molding or functional consideration dictated by economics. To mold the arm and umbrella separately from the body would increase the cost of the product substantially. The very same thing is true of the shape and surface texture of the satchel. Certainly, all of us are sufficiently sophisticated and knowledgeable to realize that manufacturers in Taiwan would not be producing metal "Uncle Sam" banks and selling them to U. S. importers if the Taiwanese manufacturers could not make a profit. They can make a profit, even if their satchel has a grainy surface

configuration or texture, simply because the Taiwanese banks are fabricated of metal and the manufacturing process is a casting as opposed to a molding process. Defendants-appellants' "Uncle Sam" bank, in contradistinction, results from a molding process. The material is plastic. The satchel is bound to have a more or less smooth surface texture as is recognized by defendants-appellants' own expert witness (A-93). Any other differences, as the lower court recognized, are trivial: they result from functional considerations, economic considerations, those relating to mechanics, packaging and transportation and, even more likely, the inability of the mechanic to faithfully reproduce the details found in the model from which he is copying after performing the step of pantographing (A-92, 94).

D. THE LOWER COURT WAS CORRECT: IT DID NO MORE THAN EXERCISE PROPER DISCRETION IN GRANTING PLAINTIFF-APPELLEE'S MOTION FOR A PRELIMINARY INJUNCTION AND PRESERVING THE STATUS QUO

1. THE STATUS QUO

The status quo in this case subsists when all of the parties, including the parties in the companion MISHAN case, 75 Civ. 428, are able to manufacture or have manufactured for them, import, offer for sale, distribute and sell "Uncle Sam" banks. It is a condition comprised of the facts and circumstances prevailing just prior to any attempt at enforcement of the illegal monopoly here involved, even though that illegal monopoly was recorded in the Copyright Office. The status quo cannot be a condition in

which the Customs Service shall be entitled to implement a restriction order respecting defendants-appellants' illegal monopoly. It can only be a condition that justifies being preserved, in which event it must be a condition grounded on the Court's estimation of the respective legal merits of the parties, Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2 Cir. 1962). The status quo cannot be a condition that precludes one from doing what he has become used to doing in the regular course of business, but is now precluded from doing because of the attempted enforcement of an illegal monopoly, and cannot be a condition comprised of nothing but inconsistencies, pp.13-16, supra.

2. THE IRREPARABLE HARM AND INJURY TO THE PLAINTIFF-APPELLEE WILL FAR OUTWEIGH THAT TO THE DEFENDANTS-APPELLANTS IF THIS COURT REVERSES THE LOWER COURT'S ORDER AND PRELIMINARY INJUNCTION OF MAY 15, 1975

The defendants-appellants are protected by the statute itself, to wit, the Copyright Law, Title 17, U.S.C. In Section 101 thereof, damages in the case of infringement of a valid copyright are stated to be the damages as well as all the profits which the infringers shall have made from such infringement. In lieu of actual damages and profits, the court shall award damages that to it shall appear to be just. In assessing such damages, the court may, in its discretion, award:

- i. In the case of a painting, statue or sculpture, \$10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

ii. In the case of any work enumerated in Section 5 of this Title, except a painting, statue or sculpture, \$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees.

In addition, full costs are to be allowed, and the court may even award to the prevailing party a reasonable attorneys' fee as part of the costs, 17 U.S.C. 116.

The Court will appreciate, therefore, that the Copyright Law, in and of itself, provides more than adequate protection for the defendants-appellants. The defendants-appellants do not need additional protection by enforcing their invalid copyright during the pendency of a trial on the merits. Such additional protection would result in irreparable harm to the others in this trade and industry who are interested in doing no more and no less than participating in free competition respecting an item that has long since been in the public domain. The Copyright Law is a prohibition against copying. Defendants-appellants should not be rewarded for something the statute, by its own terms, prohibits. A most important factor which must at all times be considered is the public, who is being deprived of the right to purchase an item that has been in the public domain since before the turn of the century. There is, then, irreparable harm and injury to the public. Expressed otherwise, the public interest is not being served well, an interest which, according to Article I, Section 8 of the Constitution, is to be protected by the Copyright Law. A reversal

of the lower court's decision will enable defendants-appellants to even attempt to return the price of their "Uncle Sam" bank to the unconscionable price originally suggested. In essence, then, defendants-appellants are being awarded damages even before their copyright is proved to be valid and infringed.

3. THIS COURT SHOULD NOT REVERSE THE LOWER COURT'S ORDER AND PRELIMINARY INJUNCTION OF MAY 15, 1975. IN NOT ONE BUT IN TWO CASES INVOLVING THE SAME SUBJECT MATTER THE LOWER COURT HELD DEFENDANTS-APPELLANTS HAVE LITTLE PROBABILITY OF SUCCESS AT A FULL TRIAL ON THE MERITS.

As discussed above, this case involves subject matter that is identical to that involved in the companion MISHAN case, 75 Civ. 428. Moreover, the defendants-appellants here are identical to the plaintiffs there. In the MISHAN case, the lower court, in attempting to insure the status quo be preserved, pointed out that:

In this circuit the prerequisites for granting a preliminary injunction are either a clear showing of probable success and possible irreparable harm, or, alternatively, a showing of sufficiently serious questions going to the merits, and a decided tip in the balance of hardships in the movant's favor. (Citing cases). In copyright cases, however, the standard is somewhat less, requiring only a showing of reasonable probability of success on the merits. (Citing cases). (A-124, 125).

The court then went on to say that:

I think that there is serious doubt as to whether plaintiffs can prevail on their infringement claim. (ibid.).

It said: In this case, the lower court did the very same thing.

In copyright cases the standard for granting a preliminary injunction is a clear showing of probability of success on the merits. (Citing cases). (A-115,116).

The lower court then reaffirmed the opinion it reached in the companion MISHAN case (A-116). Moreover, the lower court in this case reaffirmed its decision in the MISHAN case after an evidentiary hearing on plaintiff-appellee's Motion for a Preliminary Injunction.

Since the court in the companion MISHAN case found little probability of success at trial, it denied defendants-appellants' Motion for a Preliminary Injunction, thus preserving the status quo. There was no appeal in the MISHAN case. And, there is no evidence of any kind that the lower court abused its discretion in denying defendants-appellants' Motion for a Preliminary Injunction in that case.

There has been no showing that the lower court abused its discretion in granting plaintiff-appellee's Motion for a Preliminary Injunction in this case. By granting plaintiff-appellee's Motion, the lower court in this case did the same thing it did in the companion MISHAN case, namely, it preserved the status quo. Expressed otherwise, by granting plaintiff-appellee's Motion for a Preliminary Injunction in this case, it, in effect, denied defendants-appellants' Motion for a Preliminary Injunction. The lower court was simply being consistent. It did not abuse its discretion. There is no evidence that it abused its discretion. Indeed, defendants-appellants are not really appealing to this

court on the issue of the lower court's abuse of discretion, if there was any, but, rather, are appealing to this court on the issue of the validity of the copyright in question. Aside from the impropriety of so appealing, defendants-appellants have actually admitted the lower court has not abused its discretion in either case. A reversal of the lower court's decision in this case, therefore, would be to say that the defendants-appellants do have a likelihood of success at a full trial on the merits, notwithstanding that defendants-appellants have introduced no evidence that such likelihood of success exists, and also notwithstanding that, to the extent all of the parties have introduced evidence, the lower court has twice found that such likelihood of success does not exist.

Therefore, if the lower court was not clearly erroneous (and defendants-appellants have not introduced any evidence it was) and if the lower court did not abuse its discretion (and, again, here, defendants-appellants have not introduced any evidence that it did), then the lower court in this case properly granted plaintiff-appellee's Motion for a Preliminary Injunction, and this Court should affirm that decision.

It is respectfully submitted that this Court must also take into consideration the defendants-appellants' likelihood of success on this appeal. It is possible to here entertain a discussion of great length. It is, however, considered axiomatic

that, on appeal from a decision of the lower court, granting or denying a preliminary injunction, the Court of Appeals is to look primarily, if not only, into the issue of whether or not the lower court abused its discretion. In this instance, the defendants-appellants have used such language as "abuse of discretion" as a mask to hide the fact they are really trying to bring before this Court the issue of validity of their copyright. It is believed this Court, upon a simple reading of the defendants-appellants' brief, will realize that the defendants-appellants are suggesting this Court perform a function that, at this time, is totally premature. Their likelihood of success on this appeal is, accordingly, to be virtually non-existent. The lower court's Order and Preliminary Injunction of May 15, 1975 should be affirmed.

4. THE EQUITIES ARE BALANCED IN FAVOR OF THIS COURT'S AFFIRMING THE LOWER COURT'S DECISION

A balancing of the equities should prompt this Court to affirm the lower court's decision and maintain the Preliminary Injunction until there is a trial on the merits. On the one hand, as already discussed, we have the defendants-appellants who, if their copyright is found to be valid, subsisting and fully enforceable, are protected by the Copyright Law. On the other hand, we find a number of importers in this trade and industry who have been free to deal in and with "Uncle Sam" banks that have been in the public domain for many, many years and who now, all of a sudden, find themselves in the potential position of being

stayed from trading in an area that is otherwise free competition. It was not the intention of our Founding Fathers when they authored Article I, Section 8, of the Constitution to permit such as the defendants-appellants to use a Copyright that has not yet been proved to be valid, subsisting and enforceable as a sword or as a bludgeon. A reversal by this Court will permit the defendants-appellants to act in just that manner. Once this Court recognizes that, it will surely affirm the lower court's decision.

V. THIS COURT'S REVERSAL OF THE LOWER COURT'S ORDER AND PRELIMINARY INJUNCTION DATED MAY 15, 1975 WILL BE USED BY THE DEFENDANTS-APPELLANTS AS A HOLDING TANTAMOUNT TO THIS COURT FINDING THE COPYRIGHT VALID

Plaintiff-appellee will jump the gun, and assume this Court has already determined that the Copyright in question is valid if it reverses the lower court. Certainly, this is the suggestion they will be making to the U. S. Customs Service if it is required to reinstate defendants-appellants' Copyright. Even surface contact with the importing business will reveal that defendants-appellants will make sure the word gets around, and it will not be long before they will be compounding the illegality of their options. This is a result that, surely, this Court does not intend should subsist.

The issue on this appeal is whether or not the lower court abused its discretion. The main issues before the lower court are the validity of the copyright, the enforceability thereof, and whether or not the copyright was infringed. None of these issues should be of concern to this Court at this time.

Absurd as it may sound, a finding of validity of the copyright in question by this Court will suggest that anyone can obtain a valid copyright simply by varying the size of an item that has long since been in the public domain. If, for a moment, we stay with the "Uncle Sam" bank, someone might even be able to obtain a valid copyright on an "Uncle Sam" bank that has been increased to, let's say, 15 inches. Someone might obtain a valid copyright if defendants-appellants' "Uncle Sam" bank is reduced to 6 inches. Another valid copyright may be obtained simply by changing the material. We have an "Uncle Sam" bank in metal, and we have the defendants-appellants' plastic "Uncle Sam" bank. If this Court finds validity of the copyright in question, then perhaps someone else can obtain a valid copyright of an "Uncle Sam" bank in, for example, clay even though the details are identical to those of the metal or plastic "Uncle Sam" bank. Theoretically, then, an infinite number of valid and subsisting copyrights could be obtained for the very same item.

In sum and substance, then, a finding of validity respecting the copyright here in question would change the rule respecting originality as called for and required by the Copyright Law. It is considered axiomatic that the Copyright Law is, in its very essence, a prohibition against copying. A finding of validity of the copyright here would change that rule and permit valid and subsisting copyright to exist in mere copied works. This cannot be the intention of this Court, especially if one

considers the added burden that would be placed on all courts to distinguish between different kinds of mere copying (e.g., hand copying versus copying with a mechanical device, such as a pantograph). A rose by any other name is still a rose. Copying by any other name is still copying. It is the basic prohibition of the Copyright Law. This Court will not want to reward mere copying, and, therefore, it will not reverse the lower court's Preliminary Injunction of May 15, 1975.

CONCLUSION

If there is irreparable harm and injury it is first of all and foremost to the public. It is secondly to all importers who have been and merely wish to continue to freely compete in an item that has been in the public domain since before the turn of the century. There can be no harm or injury to defendants-appellants, as they have the Copyright Law to protect them should their copyright be valid. Plaintiff-appellee, here, merely sought to preserve the status quo by obtaining a Preliminary Injunction. The court below agreed that this matter deserved to have the status quo observed and granted the Preliminary Injunction.

Defendants, on the other hand, have sought to upset the status quo. They have, however, failed both here and in the companion matter, 75 Civ. 428, to present a clear showing of probable success and possible irreparable injury. Neither have they been able to show sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards defendants-appellants,

Sonesta International Hotels Corporation v. Wellington Associates et al., 483 F.2d 247, 250 (2 Cir. 1973); Checker Motors Corporation v. Chrysler Corporation, 405 F.2d 319, 323 (2 Cir. 1969). It is no wonder. Defendants-appellants take public domain items, such as "Uncle Sam" banks and "Elephant Banks", and attempt to convert them to their own through the vehicle of the Copyright Law. But the Copyright Law does not reward the mere act of copying. If there is any chance their copyright is valid, subsisting, enforceable and infringed, then the lower Court is the proper forum for all of these determinations. Defendants-appellants should bring all matters relating to the "Uncle Sam" bank to a rapid conclusion by means of an early trial in the lower Court, rather than delaying a final resolution by procedural means. This Court is not a summary judgment forum. In the interim, they are more than adequately protected by the Copyright Law itself. They should not reap the rewards of the Copyright Law prematurely, and certainly before their copyright is tried and tested. This Court, therefore, should affirm the lower court's Preliminary Injunction of May 15, 1975.

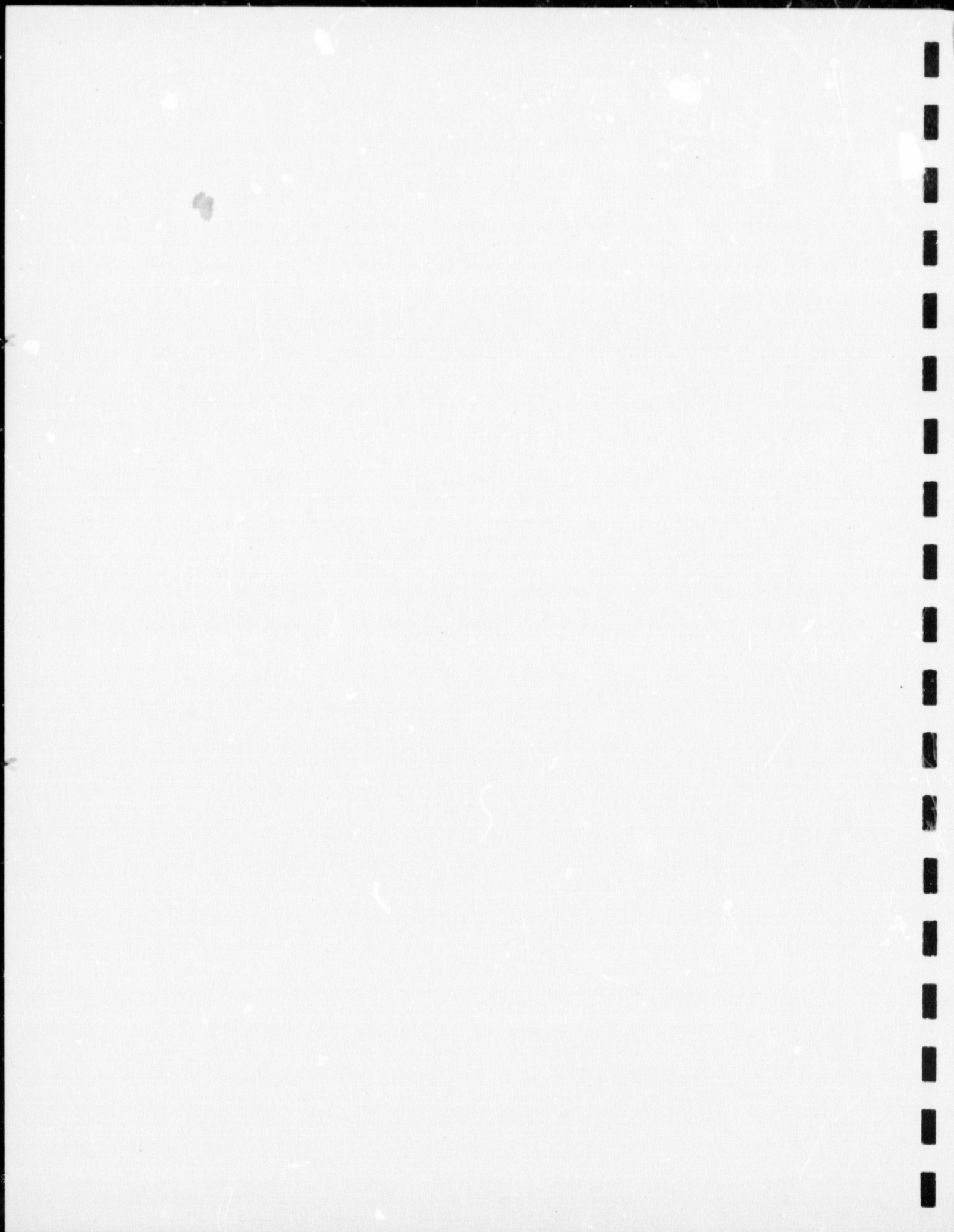
Respectfully submitted,

E. MISHAN & SONS, INC.

By 

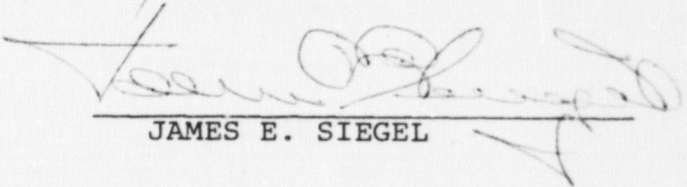
JAMES E. SIEGEL, ESQ.
MYRON GREENSPAN, ESQ.
Lackebach, Lilling & Siegel
41 East 42nd Street
New York, New York 10017
(212) 986-7630

Datpd: New York, New York
July 30, 1975



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion of E. Mishan & Sons, Inc. for Leave to File Brief as Amicus Curiae, Affidavit of James E. Siegel, Esq. and Brief of E. Mishan & Sons, Inc. as Amicus Curiae was duly served upon Robert C. Faber, Esq. and Messrs. Ostrolenk, Faber, Gerb & Soffen, attorneys for Defendants-Appellants, and Mark H. Sparrow, Esq. and Messrs. Jacobs & Jacobs, P.C., attorneys for Plaintiff-Appellee, by hand delivering same to their offices at 260 Madison Avenue, New York, New York, and 521 Fifth Avenue, New York, New York, respectively, this 31 day of July, 1975.


JAMES E. SIEGEL